Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-561

ANDREW BERRADA,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH B. EHRLICH
MARC A. ROSENBERG
Attorneys for Petitioner
Office and P. O. Address
200 Garden City Plaza
Garden City, New York 11530
(516) 248-4300

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision and Rule Involved	3
Statement	3
Reasons for Granting the Writ	4
CONCLUSION	12
APPENDIX "A"	
Order of Court of Appeals	1a

TABLE OF AUTHORITIES

Cases:	
Chapman v. *California*, 386 U.S. 18, 24 (1967)	8
Ex Parte Bain, 121 U.S. 1, 9, 10 (1887)	6
Russell v. *United States*, 369 U.S. 749 (1962)	7
Stirone v. *United States*, 361 U.S. 212 (1960)	7
United States v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975)	8
United States v. *Bynum*, 485 F.2d 490, 497 (2d Cir. 1973)	9
United States v. *Cohen*, 518 F.2d 727 (2d Cir. 1975)	9
United States v. *DeMarco*, 488 F.2d 828 (2d Cir. 1973)	6

PAGE

United States v. *Finkelstein*, 526 F.2d 517, 522 (2d Cir. 1975), *cert. denied*, 96 S.Ct. 1742 (1976) 9

United States v. *Mancuso*, 485 F.2d 275 (2d Cir. 1973) 6

United States v. *Natelli*, 527 F.2d 311, 325, 328 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1663 (1976) 7

United States ex rel. Phipps v. *Follette*, 428 F.2d 912 (2d Cir. 1970) 11

United States v *Simmons*, 390 U.S. 377 (1968) 11

United States v. *Sperling*, 506 F.2d 1323, 1341 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975) .. 6, 9

United States v. *Toliver*, — F.2d — (2d Cir. 9/2/76) 8

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Andrew Berrada petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The judgment of the court of appeals is reproduced as Appendix "A". In affirming petitioner's judgment of conviction the court rendered an oral opinion which touched on certain of petitioner's contentions on appeal. The opinion is not reported, but a transcript thereof was requested from the Clerk's Office of the United States Court of Appeals for the Second Circuit on September

30, 1976, and to the date of filing of this petition has not been received. The oral statement consequently will be filed with the Clerk of the Court separately.

Jurisdiction

The judgment of the court of appeals was entered on September 22, 1976, and this petition for certiorari was filed within thirty days of that date. The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code.

Questions Presented

1. Whether the variance between proof at trial and the conspiracy charged in the criminal indictment, which delineated as the fact pattern embracing a single over-all conspiracy four distinct incidents and specifications of theft and the criminal possession of proceeds of shipments of goods moving in interstate commerce, mandates reversal and dismissal of the conspiracy count against petitioner?

2. Whether the error of variance between proof at trial and the conspiracy charge in the indictment mandates reversal of the judgment of conviction and the grant of a new trial absent showing of clear and certain prejudice to the criminal defendant?

3. Whether an out of court photographic identification of a criminal defendant made on the basis of "Italian eyes" was a competent identification of a person, admissible in evidence under Rule 801(d)(1)(C) of the Federal Rules of Evidence?

Constitutional Provision and Rule Involved

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."

Rule 801(d)(1)(C) of the Federal Rules of Evidence provides in pertinent part:

> "A statement is not hearsay if . . . one of identification of a person made after perceiving him . . . ."

Statement

A five-count indictment was lodged in the United States District Court for the Eastern District of New York, charging petitioner with three others with four counts of substantive violations under §§ 659 and 2, Title 18, United States Code, and with one count of conspiracy to commit the aforesaid substantive offenses in violation of Section 371, Title 18, United States Code. After trial by jury in the Eastern District of New York, judgment of conviction was entered against petitioner with respect to the conspiracy charge, and with regard to two substantive counts charging him with theft of goods from interstate commerce and possession of the proceeds of the aforesaid theft, both in violation of §§ 659 and 2, Title 18, United States Code. The date involved in the alleged theft and in the two above-said counts on which petitioner stood convicted was June 28, 1973. Petitioner was acquitted of the two remaining substantive counts which covered an alleged theft and criminal possession on or about May 7, 1973.

The Grand Jury charged the four named defendants with conspiracy to "knowingly and wilfully steal, receive and have in their possession approximately four shipments of goods which had been stolen while moving as a part of interstate commerce . . . ." The conspiracy count delineated the dates of the four thefts as follows: April 27, 1973, May 7, 1973, May 29, 1973, June 28, 1973. There absolutely was no competent proof at the trial of the case that petitioner had any connection, direct, indirect or otherwise, with the April 27, 1973, theft. The Government in its brief to the United States Court of Appeals for the Second Circuit confirmed this fact by stating as follows:

> "Because appellant Berrada participated in three out of the four hijackings set forth in the conspiracy count of the indictment it is difficult to conceive how he was prejudiced by the additional testimony concerning the April 27 hijacking which occurred approximately two weeks before he actively joined the conspiracy."

Berrada consequently had no relation to the allegations concerning the April 27, 1973, theft and it is reiterated that petitioner was acquitted of the substantive offenses regarding the May 7, 1973, theft. Resultantly, it appears that the Government's assertion that petitioner participated in "three out of the four hijackings" and actively joined the conspiracy two weeks after the April 27, 1973 hijacking rests on a most tenuous if not frivolous foundation.

Reasons for Granting the Writ

1. Berrada claimed variance between the proof at trial and the allegations contained in the conspiracy count. The court of appeals apparently convinced that no prejudice inured to petitioner, found no plain error and affirmed his judgment of conviction in all respects.

The indictment founded by Grand Jury action charged Berrada in a single conspiracy revolving about four thefts. The conspiracy charged was one over-all conspiracy embracing the four thefts, and the Grand Jury charge was not in the disjunctive.* Consequently, because it was im-

---

* Count Five of the indictment, charging petitioner with conspiracy, was as follows:

COUNT FIVE

On or about and between the 1st day of April 1973 and the 1st day of July 1973, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants JOSEPH DI GISO, ANTHONY CONTRERAS, ANDREW BERRADA and ROBERT DOMINICI, also known as "Bobby" did knowingly, intentionally and wilfully combine, conspire, confederate and agree, together with Thomas Tavolacci, and Albert Strouse, also known as "Albie" named as co-conspirators but not as a defendants herein, and with others, to commit offenses against the United States in violation of Title 18, United States Code, Section 659 and Section 2, to wit: to knowingly and wilfully steal, receive and have in their possession approximately four shipments of goods which had been stolen while moving as a part of interstate commerce as follows:

Approximate Date of Theft	*Carrier*	*Contents of Shipment*	*Interstate Nature of Shipment*
April 27, 1973	United Merchant and Manufacturing Co.	Piece Goods	South Carolina—New York
May 7, 1973	Cooper Motor Lines	Yarn	South Carolina — New York
May 29, 1973	Cooper Motor Lines	Piece Goods	South Carolina — New York
June 28, 1973	Carolina Mills	Yarn	North Carolina — New York

The defendants JOSEPH DI GISO, ANTHONY CONTRERAS, ANDREW BERRADA and ROBERT DOMINICI, also known as "Bobby" and the unindicted co-conspirators Tavolacci and Strouse then knowing the said goods to have been stolen.

In furtherance of said conspiracy and to effect the objectives thereof, the defendants JOSEPH DI GISO, ANTHONY CON-

[Footnote continued on following page]

plicitly conceded by the Government that Berrada had no connection with the April 27, 1973, theft and because the record below supports petitioner's assertion that there was no proof evidencing any connection with the alleged April 27, 1973, hijacking, petitioner submits that such variance as a matter of law, and without need of any showing of prejudice, mandates the reversal of the conspiracy count of the indictment.* This Court long ago in *Ex Parte Bain*, 121 U.S. 1, 9, 10 (1887), established the well-recognized rule that no court of law may amend or modify the Grand Jury charge:

> "If it is within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggest the changes, the great importance which the common law attaches to an indictment by a grand jury as a prerequisite to a prisoner's trial for a crime and without which the constitution says 'no person shall be held to answer' may be fritted away until its value is almost destroyed."

In accord, *Stirone* v. *United States*, 361 U.S. 212 (1960); *Russell* v. *United States*, 369 U.S. 749 (1962). The proof at trial evidenced multiple conspiracies, or at a minimum evidenced that Berrada was not part and parcel of the single overall conspiracy charged in the indictment. Moreover, the jury acquitted Berrada of the substantive offenses regarding the May 7, 1973 alleged theft. Consequently, the conspiracy count must be reversed inasmuch as it is submitted that regardless of any claim or showing of prejudice, the variance between the charge and the proof cannot as a matter of law be countenanced; otherwise, the Grand Jury charge is nothing less than being materially amended or modified to conform to the proof at trial. The Court is asked to consider the question whether a judgment of conviction can stand with reference to a conspiracy charge, where there is no proof that the criminal defendant was implicated in the distinct incidents or fact patterns which comprised the Grand Jury charge of a single overall conspiracy. Cf. *United States* v. *Natelli*, 527 F.2d 311, 325, 328 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1663 (1976). It is submitted that to support the judgment of conviction against appellant on the conspiracy count, would be a modification of the Grand Jury charge which no prosecutor or court of law has the power in our mode of jurisprudence.

TRERAS, ANDREW BERRADA and ROBERT DOMINICI, also known as "Bobby" and the unindicted co-conspirators Thomas Tavolacci, and Albert Strouse, also known as "Albie" committed the following:

OVERT ACTS

1. On or about April 27, 1973 the defendants JOSEPH DI GISO and ANTHONY CONTRERAS met with co-conspirators Thomas Tavolacci and Albert Strouse, also known as "Albie".

2. On or about June 28, 1973 the defendant JOSEPH DI GISO met with the defendants ROBERT DOMINICI, also known as "Bobby" and ANDREW BERRADA and co-conspirator Thomas Travolacci in Brooklyn, New York.

3. The Grand Jury repeats and realleges as though fully set forth herein, the allegations contained in the first four counts of this indictment. (Title 18, United States Code, Section 371).

* Petitioner was sentenced to a term of five years' imprisonment on the conspiracy charge to run concurrent with a term of seven years imposed on the two substantive counts. Reversal of the conspiracy count would warrant reconsideration of the sentence imposed by the sentencing judge. *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States* v. *DeMarco*, 488 F.2d 828 (2d Cir. 1973); *United States* v. *Mancuso*, 485 F.2d 275 (2d Cir. 1973). These cases hold that remand is appropriate in cases where conviction is reversed on one or more counts, because of the possibility that the conviction on all counts originally before the sentencing court might have effected the punishment for each.

2. Petitioner submitted to the court of appeals that the proof disclosed multiple conspiracies, and the variance warranted reversal of petitioner's judgment of conviction. *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975). The Second Circuit in the case at bar, in accord with its decision in *United States* v. *Toliver*, — F.2d — (2d Cir. 9/2/76), stated that the variance must be shown to affect the substantial rights of the accused. Petitioner submits that although the number of defendants was relatively limited in his case compared to the cases in which multiple conspiracy issues have been successfully raised, cf. *United States* v. *Bertolotti, supra*, he submits that the very fact that the conspiracy charge was submitted to the jury was to his clear and certain detriment. Without doubt, the exact manner the prejudice to him inured is most difficult to pinpoint; however, it is apparent that if the conspiracy charge was dismissed against him, as we submit it should have been, this would have been to his advantage, and would have freed him in the minds of the jurors of the all-embracing charge in the indictment. The Court aptly noted in *Chapman* v. *California*, 386 U.S. 18, 24 (1967):

> ". . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

Additionally, the failure to dismiss the conspiracy count against petitioner when coupled with petitioner's contention that an incompetent photographic identification was permitted by the trial court in evidence, gives sufficient credence to petitioner's claim that rudiments of essential fairness warrant the grant of a new trial. Where the trial court was faced with a clear variance between proof and charge, and where the trial court's

charge was out of accord with requirements,* the burden of showing prejudice by a criminal defendant in a criminal prosecution need not be one so great or so certain.

3. Petitioner claims that an out of court photographic identification of him by a crucial trial witness on the basis of "Italian eyes" was blatantly prejudicial to him at the trial of his case. The witness could not make an in court identification of the petitioner. Nevertheless, the trial court denied a motion to suppress the identification.

Rule 801(d)(1)(C) of the Federal Rules of Evidence provides in pertinent part that "[a] statement is not

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* The trial court's charge with regard to the conspiracy count in pertinent part was as follows:

> "Although the indictment charges a single conspiracy, it would be possible to find separate conspiracies, one relating to the willful combination and conspiracy to knowingly and intentionally and unlawfully take from motor trucks goods and materials of a value of $100 or more, which goods had been moving as a part of or constituting part of an interstate shipment of property, and the other conspiracy to knowingly and intentionally receive and possess such goods and material, the conspirators knowing the same to have been stolen.
>
> "Whether there was one conspiracy or two conspiracies, or no conspiracy at all is a fact for you to determine in accordance with these instructions."

The charge negated the fact that if all of the activities specifically charged in the conspiracy count were shown to have been, in fact, a conglomeration of separate conspiracies, and that the hijackings were not connected, the jury was obliged to acquit. The charge given was incomprehensible with regard to this principle. See *United States* v. *Finkelstein*, 526 F.2d 517, 522 (2d Cir. 1975), *cert. denied*, 96 S.Ct. 1742 (1976); *United States* v. *Cohen*, 518 F.2d 727 (2d Cir. 1975); *United States* v. *Sperling*, *supra*, 506 F.2d at 1341; *United States* v. *Bynum*, 485 F.2d 490, 497 (2d Cir. 1973).

hearsay if . . . one of identification of a person made after perceiving him."

Approximately one year after the witness purportedly sat directly behind petitioner, the latter claimed to be the driver of the witness' hijacked truck, the witness was shown a photographic spread. Only one photograph, according to the witness, had the particular trait attributed to the driver of his hijacked truck: "Italian eyes".*

The witness' examination at trial by defense counsel evidences the incompetency of the identification:

> "Q. What did the second fellow look like? A. He had black hair. His eyes resembled a commercial with Andy Granatelli in it, definitely Italian. The eyes I guess you would say were the outstanding characteristic.
>
> "Q. You don't recall ever seeing this fellow before? A. I don't recall seeing this fellow before.
>
> "Q. Do you recall anything else about the second fellow? A. Not an awful lot.
>
> * * * * *
>
> "Q. Who is Andy Granatelli? A. At the time he was executive or president of STP Corporation that had an awful lot of advertising on television and various magazines.
>
> "Q. And you saw his picture, too? A. Yeah.
>
> "Q. And his eyes looked like the eyes of the second man as well? A. Right.
>
> * * * * *

* The witness testified he sat directly behind the driver and that he only saw the driver's face briefly. The witness did not consider it a good look at the driver.

> "Q. You know other eyes that look like the second man and pictures here, and Andy Granatelli? A. I do.
>
> "Q. In other words, you have seen many eyes that look like the eyes of the second man? A. That's correct."

The Government argued that under *United States* v. *Simmons*, 390 U.S. 377 (1968), the questioned danger of the identification was properly lessened and accommodated through counsel's opportunity to examine the witness. However, such argument distorts well-established guidelines and safeguards, meant to assure a criminal defendant a fair trial. As a matter of law, the identification was incompetent. This was buttressed by the failure of the witness to make an in court identification.

United States ex rel. Phipps v. *Follette*, 428 F.2d 912 (2d Cir. 1970), warned of the dangers inherent on poor opportunities for observation and lapsed time between the crime and confrontation; two additional factors which should have swayed the trial court to preclude the photographic identification from reception in evidence.

The witness, according to his testimony, covered the faces of the individuals on the photographs and selected petitioner on the basis of his "Italian eyes". This is not the "identification of a person" contemplated or intended under Rule 801(d)(1)(C) of the Federal Rules of Evidence. The identification in issue was so inadequate that its admission flies in the face of justice and served no purpose other than to prejudice the petitioner in the minds of the jury. The witness' out of court identification directly bore on the May 29, 1973, theft.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH B. EHRLICH
MARC A. ROSENBERG
Attorneys for Petitioner
Office and P. O. Address
200 Garden City Plaza
Garden City, New York 11530
(516) 248 - 4300

APPENDIX "A"

Order of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of September, one thousand nine hundred and seventy-six.

Present: HON. PAUL R. HAYS
HON. WILLIAM H. TIMBERS
HON. MURRAY I. GURFEIN
Circuit Judges,

76-1259

76-1281

76-1290

UNITED STATES OF AMERICA,
Plaintiff-Appellee

—v.—

JOSEPH DI GISO, ANTHONY CONTRERAS, ANDREW BERRADA and ROBERT DOMINICI, a/k/a "Bobby",
Defendants,

ANTHONY CONTRERAS, JOSEPH DI GISO, ANDREW BERRADA,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

Order of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

by VINCENT A. CARLIN
Chief Deputy Clerk

Supreme Court, U. S.
FILED
FEB 15 1977
MICHAEL RODAK, JR., CLERK

Nos. 76-561, 76-5565, 76-5573

In the Supreme Court of the United States

OCTOBER TERM, 1976

ANDREW BERRADA, PETITIONER

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JOSEPH DI GISO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
PAUL J. BRYSH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Questions presented	2
Statement	2
Argument	6
Conclusion	16

CITATIONS

Cases:

Berger v. *United States*, 295 U.S. 78	7
Biumenthal v. *United States*, 332 U.S. 539	7
Kotteakos v. *United States*, 327 U.S. 750	7, 8
Solimine v. *United States*, No. 76-72, vacated and remanded December 6, 1976	15
United States v. *Bertolotti*, 539 F. 2d 149	8
United States v. *De Sena*, 490 F. 2d 692	12
United States v. *Feola*, 420 U.S. 671	15
United States v. *Gaddis*, 424 U.S. 544	15
United States v. *Harrington*, 490 F. 2d 487	12
United States v. *Sellers*, 520 F. 2d 1281, certiorari denied, No. 76-5485, January 25, 1977	16

Statutes and rules:

18 U.S.C. 2	2
18 U.S.C. 371	2
18 U.S.C. 659	2, 14, 15

Federal Rules of Evidence:

Rule 404(b)	12
Rule 602	10

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-561

ANDREW BERRADA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 76-5565

ANTHONY CONTRERAS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 76-5573

JOSEPH DI GISO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the evidence established the single conspiracy charged in the indictment and, if not, whether petitioners Berrada and Di Giso were prejudiced by the variance.

2. Whether photographic identifications of petitioners Berrada and Contreras and related photographs of petitioner Contreras were properly admitted at trial.

3. Whether the trial court erred in refusing to permit petitioner Contreras to display his hand to the jury without taking the witness stand.

4. Whether the trial court erred in its instruction on criminal intent with respect to the conspiracy charge.

5. Whether the trial court erred in failing to instruct the jury that it could not convict petitioner Di Giso of both theft and possession of the stolen goods.

STATEMENT

Petitioners were tried before a jury in the United States District Court for the Eastern District of New York for substantive violations of 18 U.S.C. 659 and 2, and for conspiracy (18 U.S.C. 371) to violate 18 U.S.C. 659. In connection with a May 7, 1973, truck hijacking, petitioners Di Giso and Contreras were each convicted of one count of theft of goods from interstate commerce and one count of receipt and possession of goods stolen from interstate commerce. In connection with a June 28, 1973, truck hijacking, petitioners Di Giso and Berrada were each convicted

of one count of theft of goods from interstate commerce and one count of receipt and possession of goods stolen from interstate commerce. All three petitioners were convicted on one count of conspiracy to steal, receive, and possess goods stolen from interstate commerce.[1] The court of appeals affirmed from the bench and rendered an oral opinion, which has been transcribed and filed with this Court as a supplement to Berrada's petition.

The government's evidence showed that petitioners took part in a series of hijackings as follows:

(a) At approximately 3:30 a.m. on April 27, 1973, Thomas Tavolacci, Albert Strouse,[2] and petitioners Di Giso and Contreras met, pursuant to a pre-arranged plan, at the home of Dorothy Graziano, Tavolacci's girlfriend (Tr. 54-57). From Graziano's house, they drove in two cars to the Verrazano Bridge, where they waited for a truck to hijack (Tr. 58, 60). They observed a United Merchants tractor-trailer and followed it to the vicinity of Church and

---

[1] Di Giso was sentenced to concurrent terms of eight years' imprisonment on the four substantive counts and five years' imprisonment on the conspiracy count. Contreras was sentenced to three concurrent five-year terms of imprisonment. Berrada was sentenced to concurrent terms of seven years' imprisonment on the theft and the receipt and possession counts and five years' imprisonment on the conspiracy count.

[2] Tavolacci, a participant in some 30 truck hijackings, had entered into a plea agreement with the government (Tr. 102-103) and testified at petitioners' trial. Strouse, who had previously been found dead, was not named as a defendant (Tr. 58-59).

Worth Streets in Manhattan, where the driver backed it into a building (Tr. 61). Tavolacci forced the two truck drivers at gunpoint into one of the cars, a blue Chevelle driven by Contreras, and Tavolacci and Contreras drove around with the two men for several hours before releasing them (Tr. 61-62, 64, 449-452). Di Giso and Strouse drove the truck away and sold the contents, piece goods, to the Harris Department Store in Montclair, New Jersey (Tr. 65, 365-366, 377) for a price of between five and seven thousand dollars (Tr. 383). Several days later, Tavolacci accompanied Di Giso when the latter collected part of the purchase money (Tr. 66-67). Tavolacci received $1,500 in three payments from Di Giso (Tr. 68). Tavolacci testified that "when there was four of us we split it evenly" (Tr. 112).

(b) On May 7, 1973, Tavolacci and petitioners Di Giso, Contreras, and Berrada met before dawn at Graziano's pursuant to a prior arrangement (Tr. 71-72). They left the house and, after looking for several hours, observed a Cooper Motor Lines tractor-trailer parked on Hamilton Avenue in Brooklyn (Tr. 72). Tavolacci forced the driver, Sam Brown, into the Chevelle at gunpoint, and Tavolacci and Contreras drove around with him for several hours before releasing him (Tr. 73-74, 565-568). Di Giso and Berrada took the truck away (Tr. 74) but could not sell the load, material worth approximately $40,000 (Tr. 713). They therefore abandoned the goods with the truck (Tr. 74-75).

(c) A third early morning meeting at Graziano's house occurred on May 29, 1973. In attendance were Tavolacci, Strouse, and petitioners Di Giso and Berrada (Tr. 76). The group found a Cooper Motor Lines truck parked in an alley near Canal Street and West Broadway (Tr. 77-78). The two drivers, one of whom had been the victim of the May 7 hijacking, were forced at gunpoint into the Chevelle, driven around for several hours by Tavolacci and Berrada, and then released (Tr. 78-79, 573-574). Di Giso and Strouse left with the truck. Di Giso sold the truck's contents, yarn worth approximately $31,000 (Tr. 711), to Vanguard Knits in Brooklyn for $6,000 (Tr. 79, 280-284).

(d) On June 28, 1973, following a fourth predawn meeting at Graziano's, at which Tavolacci, petitioners Di Giso and Berrada, and co-defendant Robert Dominici were present, the group hijacked a Carolina Mills truck. They spotted the truck by the Verrazano Bridge and followed it to Flushing Avenue, where it stopped (Tr. 86-87). Tavolacci then forced the two drivers into the Chevelle at gunpoint, and he and Dominici drove around for about three hours with the two drivers before releasing them (Tr. 87-88). That afternoon Di Giso told Tavolacci that he had sold the load, yarn worth more than $23,000 (Tr. 618), to Vanguard Knits (Tr. 89, 284-288).

In addition, on July 16, 1973, Tavolacci, Di Giso, and Contreras went out looking for another truck to hijack, but they were unable to find one (Tr. 99-100).

Telephone records introduced at trial indicated that, during the period in which the hijackings occurred, Tavolacci and the petitioners regularly talked with one another. The evidence also showed that they met together on occasion during this period (Tr. 68-70, 80, 817-822).

ARGUMENT

1. (a) Petitioners Di Giso and Berrada contend that the proof at trial established the existence of multiple conspiracies instead of the single conspiracy charged in the indictment (Di Giso Pet. 5-6; Berrada Pet. 4-9), and they claim prejudice as a result of this alleged variance. These contentions are without merit, and there is no occasion for this Court to review the conclusion of the court of appeals (Berrada Pet. App., slip op. 2a) that there was sufficient evidence to support the charge of a single conspiracy.

A group of six persons met, over a period of a few months, in crews of four, to carry out truck hijackings. While the membership of the particular crews shifted, this was because not more than three or four were needed at any particular time (Tr. 63). Petitioners' activities constituted a loose-knit business venture with an established method of operation. A meeting would be prearranged, it would take place in the same location each time, in the early morning hours. The crew would look for a truck entering New York City and follow it until it stopped. The driver or drivers would be forced from the truck and then driven around for several hours by two members of the crew, while the other members at-

tempted to sell the contents of the truck, and then abandoned the truck. The driver would be released after sufficient time had elapsed for the other hijackers to dispose of the truck. Arrangements were made for collecting payment, and the proceeds would be divided up in an agreed-upon fashion. Even the customer to whom stolen goods were sold was the same on two of the four occasions. The conspirators had "knowledge of the plan's general scope * * * [and] sought a common end." *Blumenthal* v. *United States*, 332 U.S. 539, 559.[3]

Even if the evidence proved several conspiracies rather than one, petitioners suffered no prejudice.[4] Di Giso complains (Pet. 6) of an unfair spillover of evidence relating to conspiracies in which he was not involved, presumably on the ground that this evidence could confuse or inflame the jury. The record shows that such a spillover would be impossible with regard to Di Giso, since he participated in every one of the hijackings about which evidence

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[3] The existence of a single conspiracy is not disproved by the fact that Berrada arguably joined the conspiracy after several hijackings had occurred. Rather, the evidence shows Berrada joined an already existing conspiracy and proceeded to take part in at least two hijackings.

[4] Contrary to Berrada's contention, it has been long established that a showing must be made that there has been "such a variance [between the indictment and proof at trial] as to 'affect the substantial rights' of the accused." *Berger* v. *United States*, 295 U.S. 78, 81-84. See also *Kotteakos* v. *United States*, 328 U.S. 750. A showing of variance alone is not sufficient.

was presented. Berrada's complaint (Pet. 8) is somewhat different: that he was prejudiced in relation to the substantive charges against him simply by presentation of the conspiracy count to the jury; he concedes (Pet. 8) his inability to identify specific prejudice. This theory was not presented to the court of appeals and therefore should not be considered now. It is, in any event, a specious argument, since it assumes its conclusion—that presentation of the conspiracy count to the jury was *ipso facto* prejudicial. But variance is not improper until some independent showing of prejudice is made, and Berrada can make no such showing.[5]

(b) Petitioners Berrada and Di Giso also complain that the charge to the jury did not state that if several conspiracies were shown rather than one conspiracy, the jury was required to acquit (Berrada Pet. 9, n. *; Di Giso Pet. 5-6). We submit that this issue was clearly and correctly presented to the jury in a manner that satisfied petitioners' objections.

The court required the jury to find that a conspiracy existed as charged in the indictment and made

[5] On this record it is highly unlikely that prejudice resulting from spillover of evidence on unrelated counts could be shown by Berrada, since only four defendants were on trial, and the evidence was not complicated or disparate. The jury was unlikely to become confused. This was not a mass trial of the sort disapproved in *Kotteakos* v. *United States, supra,* in which defendants could be swept up on the basis of voluminous, inflammatory testimony about crimes in which they took no part. See also *United States* v. *Bertolotti,* 529 F. 2d 149 (C.A. 2).

it clear that their only choices were to find a single conspiracy, two conspiracies (one for the thefts and the other for possession of the stolen goods), or no conspiracies at all.[6]

Petitioners failed, in any event, to request the trial judge to charge the jury in the manner they now contend would have been proper.[7] They can therefore complain only of plain error. There was, however, no plain error even if some change in the charge would have been preferable, since there is little likelihood that a different charge would have produced

[6] The court stated (Tr. 1094, 1099; emphasis supplied):

> In your consideration of the evidence in the case as to the offense of the conspiracy charge you should first determine whether or not the conspiracy existed, *as alleged in the indictment.* If you conclude that the conspiracy did exist, you should next determine whether or not each of the accused willfully became a member of the conspiracy.
>
> * * * * *
>
> Although the indictment charges a single conspiracy, it would be possible to find separate conspiracies, one relating to the willful combination and conspiracy to knowingly and intentionally and unlawfully take from motor trucks food and materials of a value of $100 or more, which goods had been moving as a part of or constituting part of an interstate shipment of property, and the other conspiracy to knowingly and intentionally receive and possess such goods and material, the conspirators knowing the same to have been stolen.
>
> Whether there was *one conspiracy or two conspiracies, or no conspiracy at all,* is a fact for you to determine in accordance with these instructions.

[7] The petitioners incorrectly requested a charge that if the jury found more than one conspiracy, defendants could be found guilty only if they were members of all the conspiracies.

a different verdict on the conspiracy count (as to which petitioners' sentences were in any event concurrent with their sentences for the substantive offenses).

2. Petitioners raise a number of challenges to the evidence. These claims are without merit and present no question appropriate for resolution by this Court.

a. Petitioner Berrada argues (Pet. 8-11) that the witness Sam Brown, who was the victim of two hijackings, should not have been permitted to testify as to his prior identification of Berrada from a photographic spread because his identification was weak. Specifically, Berrada contends that Brown did not have an adequate opportunity to observe him at the time of the hijackings and was not able, at trial, to give a sufficiently detailed explanation of his reasons for choosing Berrada's picture from the photographic spread. Berrada does not contend that the photographic spread was unnecessarily suggestive; his objections simply go to the weight of the evidence, a matter that was properly left to the jury.

Petitioner Contreras similarly argues that Brown's testimony concerning his prior identification of Contreras should not have been admitted because Contreras was wearing sunglasses, and Brown therefore could not have had the "personal knowledge" of Contreras' face required by Rule 602, Fed. R. Evid. This argument too goes only to the weight of the evidence, since Brown clearly did have personal knowledge of Contreras' general appearance. The issue was properly left to the jury.

Counsel for Berrada and Contreras took full advantage of their opportunity to explore the weaknesses in Brown's testimony during cross-examination (Tr. 589-600) and to point out those weaknesses in their closing arguments (Tr. 970-973, 1002-1007). Petitioners were entitled to no more.

b. Petitioner Contreras contends that the introduction of mugshots of him was reversible error, because the pictures suggested to the jury that Contreras had a prior criminal record.

Petitioner's counsel did not object to the photographs at the time of their admission in evidence (Tr. 578). Instead, he later asked to have the profile view photo removed (Tr. 638). When the court denied this request, the government offered to allow defense counsel to inform the jury that the photographs were taken only in connection with the arrest in this case. The court agreed to this procedure (Tr. 638-639). Thus, petitioner was given ample opportunity to avoid any inference that might arise from the mugshots that he had a prior criminal record, and he cannot complain now of any inferences drawn by the jury.

In any event, Contreras concedes that the picture was not visibly marked to show any prior criminal record. Further, there was a demonstrable need on the part of the government to introduce the photographs because Brown was unable to make an in-court identification of Contreras. Since the discussion concerning the treatment of the mugshots was conducted outside the hearing of the jury (Tr. 638-

639), no unnecessary attention was drawn to the fact that they were mugshots. The use of the mugshots was therefore appropriate, and the procedures used were proper. See *United States* v. *Harrington*, 490 F. 2d 487 (C.A. 2); *United States* v. *De Sena*, 490 F. 2d 692 (C.A. 2).

c. Petitioner Di Giso contends (Pet. 9-10) that evidence of an unsuccessful attempt at hijacking on July 16, 1973, was not properly admitted under Rule 404(b), Fed. R. Evid., since it occurred after the conspiracy as charged had terminated and only served to attack his character. Petitioner's counsel did not object to the evidence at trial (although the other defendants did so), and therefore he cannot now challenge its admission. This contention is in any event without merit. The evidence was properly admitted under Rule 404(b) to show the method of operation of the conspirators as well as the intent or knowledge of Di Giso and Contreras with regard to the conspiracy.

d. Hoyt Shedd, one of the drivers of the truck hijacked on April 27, made a statement to the F.B.I. on the day of the hijacking. In this statement one of the hijackers, allegedly Contreras, was described as having a one and one-half inch scar on his right hand. Shedd was unavailable to testify at trial and allegedly no longer had any recollection of the hijacking. In a somewhat unusual procedure, petitioner Contreras' counsel read Shedd's statement to the jury so that he could then impeach it by showing that Contreras had no such scar (Tr. 848-854, 874).

It was expected that this impeachment would occur through testimony by a witness, but the witness turned out to be unavailable (Tr. 650, 875-876). Petitioner then proposed, in lieu of this second unavailable witness, to put Contreras on the stand for the limited purpose of testifying that he had no scar in April 1973 (Tr. 874). When the judge refused to impose special restrictions on the prosecution's cross-examination of Contreras, counsel proposed instead to have Contreras show his hand to the jury without being subject to any cross-examination. The judge refused to allow that procedure, ruling that Contreras would in that event be sworn as a witness and the government allowed to cross-examine him regarding the matter (Tr. 875-876). Contreras made no effort to put any other witness on the stand to testify about his hand.

The court of appeals correctly concluded that this particular incident, even if involving an erroneous ruling by the district court, was harmless error. The evidence was relevant, if at all, only to the April 27 hijacking. Contreras was not charged with that substantive offense, and evidence relating to that hijacking was admitted for its bearing on the conspiracy charge. Whatever slight probative value Contreras' lack of a scar in 1976 may have had with respect to the question of his participation in the April 27, 1973, hijacking, his conspiracy conviction plainly did not depend upon showing his participation in that incident. Since the jury found he participated in the May 7 hijacking, and had before it sub-

stantial other evidence of his involvement with his co-defendants at the time of the hijackings, it is farfetched to suppose that any doubts induced by the scar evidence could have affected the jury's verdict on the conspiracy count. Moreover, petitioner Contreras' sentence on the conspiracy count was concurrent with a sentence of equal length for the May 7 hijacking.

3. Petitioner Di Giso contends (Pet. 7) that the trial court erred in charging the jury in connection with the conspiracy count that it "is ordinarily reasonable to infer a person intends the natural and probable consequences of acts knowingly done or knowingly omitted" (Tr. 1101). He complains that this portion of the charge improperly lessened the government's burden of proof of criminal intent concerning the formation of the conspiracy to violate 18 U.S.C. 659.

This charge appears to be an elaboration by the court of its discussion of the term "knowingly." It does not relate, as petitioner suggests, to the court's explanation of the degree of criminal intent required to show willfulness. The court made it plain that willfulness requires specific intent to violate the law (Tr. 1100). The court further made it clear that the conspiracy must be willfully formed for the purpose of unlawfully taking goods in interstate commerce from motor trucks and/or receiving and possessing such goods (Tr. 1091), and that participation in the plan with intent to further its objectives must be willful (Tr. 1092-1096). This instruction

therefore properly required for the conspiracy charge the same degree of criminal intent—that is, specific intent—required for the substantive offense (18 U.S.C. 659) of stealing "with intent to convert to [one's] own use" goods in interstate commerce. *United States* v. *Feola*, 420 U.S. 671.

The instruction complained of by defendant, at worst, is somewhat cryptic, and it is harmless taken in the context of the entire, detailed instructions to the jury on conspiracy.

4. Petitioner Di Giso contends that the district court's failure to charge the jury that a defendant may not be convicted of both larceny and criminal possession under 18 U.S.C. 659 constitutes reversible error. He does not appear to be contending that his convictions and concurrent sentences on the possession counts should be vacated,[8] but rather for a ruling that the erroneous jury instruction requires a new trial.

As we noted in *Solimine* v. *United States*, No. 76-72, vacated and remanded December 6, 1976, we believe that the rationale of this Court in *United States* v. *Gaddis*, 424 U.S. 544, applies also to bar multiple convictions under 18 U.S.C. 659 for theft from an interstate shipment and possession of the proceeds of that theft. Failure of the trial court properly to instruct against returning verdicts on both counts is not, however, reversible error. All that a defendant

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[8] Petitioner provides no argument in support of this point in his petition.

is entitled to in such a case is vacation of the conviction and sentence on the possession count (see *United States* v. *Sellers*, 520 F. 2d 1281 (C.A. 4), certiorari denied, No. 76-5485, January 25, 1977), relief that petitioner has not sought.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
PAUL J. BRYSH,
Attorneys.

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